AUG 3 0 2007
OFFICE OF THE CLERK

No. 07-113

In the Supreme Court of the United States

CITY OF CINCINNATI,
Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

BRIEF IN OPPOSITION

W. KELLY LUNDRIGAN
Counsel of Record
GARY E. POWELL
ELIZABETH L. HUTTON
MANLEY BURKE LPA
225 WEST COURT STREET
CINCINNATI, OH 45202
(513) 721-5525
(513) 721-4268 FAX
wkl@manleyburke.com
Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

STATEMENT PURSUANT TO RULE 29.6

There are no parties to the proceedings other than those listed in the caption. Respondent, Cleveland Construction Company, Inc., has no parent corporation and no publicly-held company owns 10% or more of its stock.

TABLE OF CONTENTS

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF AUTHORITIES v

SUMMARY OF REASONS TO DENY THE PETITION 1

STATEMENT OF THE CASE 3

A. The Current Controversy 3

B. The City of Cincinnati's Small Business Enterprise Program 4

C. The SBE Rules and Guidelines 6

D. The Bid Documents 10

E. The Cincinnati Convention Center Project 11

F. Proceedings Below 12

REASONS FOR DENYING THE PETITION 14

I. This Court Has No Jurisdiction Under 28 U.S.C. §1257 To Grant this Petition Because There Has Not Been a Final Appealable Judgment 14

II. The Petition Should be Denied Because the Lower Courts' Decisions are in Harmony with Long Standing Jurisprudence that Government Programs that Encourage and Pressure Discrimination Based on Race are Subject to Strict Scrutiny 20

A. Petitioner's Characterization of its SBE Program is not Controlling 20

B. The Lower Courts' Determinations that the City's SBE Program Encourages and Pressures Discrimination Based on Race, Triggering Strict Scrutiny, are Consistent with this Court's Decision in *Adarand Constructors v. Pena* 22

C. The Lower Courts' Determinations that the City's SBE Program Encourages and Pressures Bidders to Discriminate Based on Race are Consistent with the Jurisprudence of other Federal Courts 24

III. The Lower Courts' Decisions Are Consistent with this Court's Holding in *Parents Involved in Community Schools v. Seattle School District No. 1* 27

CONCLUSION 28

APPENDIX

Appendix A: Cincinnati Convention Center Expansion and Renovation Availability Estimation Sheet 1b

Appendix B: City of Cincinnati Subcontracting Outreach Program Summary 2b

Appendix C: City of Cincinnati Small Business Division Office of Contract Compliance Rules and Guidelines 6b

Appendix D: City of Cincinnati project forms 26b

Appendix E: Construction Bid Document 39b

TABLE OF AUTHORITIES

Cases

Adarand Constructors v. Pena,
515 U.S. 200 (1995) . . . . . *passim*

American Const. Co. v. Jacksonville, T. & K.W. Ry.,
148 U.S. 372 (1893) 14

Bras v. Calif. Pub. Util. Comm.,
59 F.3d 869 (9th Cir.1995) 21, 26

Bruce v. Tobin,
245 U.S. 18 (1917) 16

Cox Broadcasting Corp. v. Cohn.,
420 U.S. 469 (1975) . . . . . *passim*

Florida v. Thomas,
532 U.S. 774 (2001) 19

Flynt v. Ohio,
451 U.S. 619 (1981) 16, 18

Grutter v. Bollinger,
539 U.S. 306 (2003) 22, 27, 28

Jefferson v. City of Tarrant, Ala.,
522 U.S. 75 (1997) 16

Johnson v. California,
543 U.S. 499 (2005) 27, 28

Lutheran Church-Missouri Synod v. FCC,
141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*,
154 F.3d 487 (D.C. Cir. 1998) 24, 25

Martinez v. International Banking Corp.,
220 U.S. 214 (1911) 16

Mississippi Central R. Co. v. Smith,
295 U.S. 718 (1935) 16

Monterey Mechanical v. Wilson,
125 F.3d 702 (9th Cir. 1997) 25

Palmore v United States,
411 U.S. 389 (1973) 17

Parents Involved in Community Schools v. Seattle School District No. 1,
127 S.Ct. 2738 (2007) 27

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945) 15, 16

Republic Natural Gas Co. v. Oklahoma,
334 U.S. 62 (1948) 16

Safeco Ins. Co. of America v. City of White House, Tenn.,
191 F.3d 675 (6th Cir. 1999) 21, 26, 27

Statutes and Codes

28 U.S.C. §1257 . . . . . *passim*

Cincinnati Municipal Code Chapter 323 . . . . . 4, 5, 6

SBE Program's Rules and Guidelines . . . . . *passim*

BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

Petitioner City of Cincinnati (the "City") has invoked 28 U.S.C. §1257 as the basis for this Court's appellate jurisdiction. However, this Court does not have jurisdiction because there is no final appealable judgment. As a result, this Petition is not ripe for review.

On December 8, 2006, the Court of Appeals for the First Appellate District, Hamilton County, Ohio ("First District Court of Appeals") rendered a judgment finding that the City's Small Business Enterprise program ("SBE Program") indisputably encouraged and pressured bidders for public contracts to discriminate on the basis of race and gender and was subject to heightened scrutiny. The City submitted a petition for writ of certiorari to the Supreme Court of Ohio on five issues, including the First District Court of Appeals' finding that the City had violated Respondent Cleveland Construction's ("Cleveland") 14th Amendment equal protection rights.

The Supreme Court of Ohio accepted two issues for review. The first issue involves whether a disappointed bidder can have a constitutionally-protected property interest in a publicly bid contract to which due process protections apply. The second issue involves whether a disappointed bidder may recover damages under 42 U.S.C. §1983 for a constitutional violation where state law would deny a damages remedy to such a bidder. Obviously, both issues present significant federal law and constitutional issues. The Supreme Court of Ohio denied discretionary review of the equal protection issue that the City has prematurely presented to this Court. The appeal to the Supreme Court of Ohio is pending.

While there are four exceptions to the firmly established final judgment rule which permit the invocation of this Court's appellate jurisdiction despite the fact that proceedings are still ongoing in the state courts, none of those four apply to this case. The two issues currently being considered by the Supreme Court of Ohio are of such federal and constitutional relevance that they will likely be appealed to this Court, presenting the potential for piecemeal review.

If this Court determines that the case is ripe for review, the Petition still must be denied. The City has mischaracterized its SBE Program as a "discretionary, non mandatory municipal outreach/tracking program."[1] In reality, the SBE Program is infused with race and gender-conscious provisions. The City conceded that it lacked a proper evidentiary basis to establish any compelling interest in remedying past discrimination.[2] The decisions of the trial court and the First District Court of Appeals are soundly supported by the facts and are consistent with prevailing jurisprudence, including that of this Court.

The Court should therefore deny the City of Cincinnati's Petition because this case does not qualify for, or merit, review.

---

[1] Petitioner's Br. at 17, *et seq.*

[2] Petitioner's Br. at 12.

STATEMENT OF THE CASE

A. The Current Controversy

In response to a solicitation of bids, Cleveland Construction submitted the lowest bid for the drywall work in the City of Cincinnati's Convention Center Expansion and Renovation Project. The City conceded that Cleveland's bid fully complied with all bid requirements, except for the fact that Cleveland did not subcontract out at least thirty-five percent of its work to small business enterprises ("SBEs"), as required by the SBE Program's Subcontracting Outreach Program. The City awarded the contract to the second lowest bidder, whose bid was more than $1.2 million higher than Cleveland's.

Cleveland sued and claimed, among other things, that the City's SBE Program was unconstitutional because it encouraged and pressured contractors to subcontract with minority and female-owned firms. As part of the bid documents, the City informed bidders that they "should be able to include minority and female firms at the level of availability"[3] as determined by the City. For the drywall contract, the City calculated the minority business enterprise ("MBE") availability to be 13.09 percent and the women's business enterprise ("WBE") availability at 1.05 percent. The SBE Program required all bidders to document their efforts to meet the availability estimate for MBEs and WBEs and cautioned all bidders that if they "failed to achieve levels of minority or women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall

---

[3] App. 2b.

be subject to an inquiry by the Office of Contract Compliance."[4]

B. The City of Cincinnati's Small Business Enterprise Program

In 1999, the City adopted the SBE Program to replace its Equal Business Opportunity Program. The Equal Business Opportunity Program included a minority set aside and was struck down as unconstitutional because the City lacked evidentiary findings that would justify a race conscious program.

The SBE Program's purpose, but not its substance, is set forth in Chapter 323 of the Cincinnati Municipal Code ("CMC"). CMC §323-7, entitled "Program Goals," explicitly states that the SBE Program contains a specific participation goal for MBEs and for WBEs, in addition to an overall participation goal for small businesses. CMC §323-7 designates a 30% participation goal for small business enterprises for construction supplies, services, and professional services. It also establishes MBE and WBE annual participation goals of 30% construction, 15% supplies/services, and 10% professional service. To carry out the meaning and purpose of the SBE Program, CMC §323-7 empowered the City Manager to issue and enforce rules and regulations.

The SBE Program's Rules and Guidelines provided the substance of the SBE Program requirements that applied to bidders on the Convention Center Project, and which both the trial court and the First District Court of Appeals found

---

[4] App. 10b.

indisputably encouraged and pressured Cleveland to discriminate on the basis of race and gender in violation of Cleveland's 14th Amendment equal protection rights. The City did not include any of the provisions of the Rules and Guidelines in its Petition nor did it discuss any of the parts of the SBE Program declared unconstitutional by the lower courts.

In 2002, as the City prepared to renovate and expand the Cincinnati Convention Center, City Council hired a consultant to conduct a disparity study to determine if the City had the factual predicate that would enable it to reconfigure its SBE Program to be race or gender-conscious. After conducting the disparity study, the consultant determined that it did not. The consultant presented the results of his disparity study, as well as proposed revisions to the SBE Program, to City Council. Under political pressure from the Vice Mayor to make the program more aggressive, and more likely to induce contractors to subcontract with MBEs and WBEs on City projects, the consultant developed a "Non-Discrimination Program" and a "Subcontracting Outreach Program" to incorporate into the SBE Program. These revisions were ultimately adopted by City Council and codified in CMC Chapter 323 by reference.

The Subcontracting Outreach Program ("SOP") is contained in CMC §323-31 and is a subset of the SBE Program. The SOP applies to all City-funded construction contracts of $100,000 or more and requires bidders to make a good faith effort to subcontract a pre-determined percentage of its work to small, minority and women-owned businesses.[5] It is undisputed that Cleveland's failure to meet these

---

[5] App. 12b-13b.

subcontracting percentages as part of the SBE Program for the Convention Center Project was the basis upon which the City awarded the contract to a bidder who was 1.2 Million Dollars higher in price, but who met the SBE percentages for the project.

C. The SBE Rules and Guidelines

The SBE Program's Rules and Guidelines promulgated by the City pursuant to CMC §323-31 explicitly state that the purpose of the SBE program is:

> to *ensure* that all bidders, vendors, and contractors . . . doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, *to the extent of their availability*, on contracts which are paid in whole or in part with monetary appropriations from the City of Cincinnati.[6]

The Rules and Guidelines are rife with additional race and gender-conscious provisions, none of which were discussed or acknowledged in the City's Petition, including the following:

> * "In order to be considered as responsive, all bidders/proposers are required to use good faith efforts to promote opportunities for Minority and Women Business Enterprises to participate in and compete for, *to the extent of their availability*, contracting, subcontracting, and purchasing opportunities. Prior to the award of any contract

---

[6] App. 7b (emphasis added).

related to construction services or professional services, the City *shall* evaluate each bidder's *documented efforts* to achieve participation of minority and women business enterprise firms."[7]

* "Upon its successful implementation, the Non-Discrimination Program [a component of the SBE Program] will result in utilization of minority and women-owned firms *to the extent of their* [governmentally specified] *availability*... ."[8]

* "The City of Cincinnati, or its designated agent, will *evaluate* efforts made by bidders to promote opportunities for minority and women-owned firms (MBE/WBE) to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. ... If the *evaluation* determines that a bidder has *failed to achieve* levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding *availability and capacity* of such business, the bidder *shall* be subject to an *inquiry* by the Office of Contract Compliance."[9]

* "Bidders or Offerors [operating under the Subcontracting Outreach Program] *should be able* to include the participation of minority and female firms

---

[7] App. 8b-9b (emphasis added).

[8] App. 10b (emphasis added).

[9] App. 10b (emphasis added).

at the *levels of availability* determined in the City of Cincinnati Disparity Study."[10]

* "The SBDOCC [Small Business Division Office of Contract Compliance] will maintain a database to assist bidders in identifying minority and women business enterprises with capabilities commensurate with general contracting requirements. ... The list prepared from the database specifies which firms the City has determined to meet the requirements necessary for designation as minority and women business enterprises."[11]

* "Contractors *are required* to maintain documentation regarding the utilization of minority and women business enterprises, and all other pertinent records, during the performance of award of their contract."[12]

One of the most significant race and gender-conscious provisions contained in the Rules and Guidelines is the good faith effort requirement that bidders:

provide a *detailed description* of the techniques used to *obtain participation* of minority and women-owned business enterprises, including segmenting of the work into 2 or smaller units (areas for subcontracting), attending pre-bid conferences, soliciting specific minority and women-owned firms, soliciting trade

---

[10] App. 13b (emphasis added).

[11] App. 11b.

[12] App. 11b (emphasis added).

> associations that focus on minority and women-owned businesses, advertising efforts, and other methods used.[13]

Further, "[b]idders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project."[14] To prove that the bidders made the requisite "good faith efforts" to solicit MBEs and WBEs, bidders were required to submit Form 2007 "Statement of Good Faith Efforts"[15] with their bids containing detailed descriptions of the techniques used to obtain the maximum practical participation of MBEs and WBEs. A failure to achieve participation by the estimated availability of MBEs and WBEs as calculated by the City, which for the drywall contract was 13.09% MBEs and 1.05% WBEs, would trigger an investigative inquiry. Specifically, the Rules and Guidelines state:

> If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. *The burden is on the bidder to explain the low utilization percentage.* If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-

---

[13] App. 15b (emphasis added).

[14] App. 18b (emphasis added).

[15] App. 35b-36b.

> utilization, then *the matter is turned over to the investigative unit for a discrimination investigation.*[16]

The discrimination investigation could involve local, state, or federal agencies charged with investigating and resolving civil rights violations or enforcing laws relating to discriminatory treatment. Those accused of discrimination must defend themselves against each allegation with specificity and particularity.[17]

D. The Bid Documents

While the Rules and Guidelines contain explicit race and gender-based preferences, the bid documents circulated to bidders for the convention center project, including Cleveland, did as well. The bid package included a Subcontracting Outreach Program Summary.[18] The Summary listed the SBE goals per trade contract, which for the drywall contract was 35%.[19] Bidders also received an "Availability Estimation Sheet" listing the availability percentage for MBEs and WBEs for each project. Bidders were told that they "*should be able* to include minority and female firms at the level of availability indicated."[20] The availability estimate for the drywall project listed MBE availability at 13.09% and

---

[16] App. 15b (emphasis added).

[17] App. 19b-25b.

[18] App. 2b-5b.

[19] App. 3b.

[20] App. 2b (emphasis added).

Item Description: CINCINNATI CONVENTION CENTER
EXPANSION AND RENOVATION
Date Issued: December 23, 2003

AVAILABILITY ESTIMATION SHEET

VAILABILITY ESTIMATION - Subcontractor Outreach Program (CMC 323-31)

The preliminary availability estimate for this project is:

The preliminary availability estimate for this project is:

Commodity Code 099-01	Description TC-01B General Trades	11.26 % Minority	3.97 % Female
Commodity Code 099-01-01	Description TC-01C Interior Remediation	13.09 % Minority	1.05 % Female
Commodity Code 099-01	Description TC-02E Temporary Conditions	11.26 % Minority	3.97 % Female
Commodity Code 099-01	Description TC-02F Selective Demolition	11.26 % Minority	3.97 % Female
Commodity Code 099-01-01	Description TC-04A Masonry	13.09 % Minority	1.05 % Female
Commodity Code 099-01-01	Description TC-06A Millwork	13.09 % Minority	1.05 % Female
Commodity Code 099-01-01	Description TC-08A Doors, Frames & Hardware	13.09% Minority	1.05 % Female
Commodity Code 150-55	Description TC-08B Overhead Doors	25.0 % Minority	0.00 % Female
Commodity Code 099-01-01	Description TC-09A Drywall	13.09 % Minority	1.05 % Female
Commodity Code 910-09	Description TC-09C Soft Floors	13.33 % Minority	0.00 % Female
Commodity Code 099-01	Description TC-10A Specialties	11.26 % Minority	3.97 % Female
Commodity Code 165-00	Description TC-11A Food Service Equipment	6.90 % Minority	0.00 % Female
Commodity Code 099-09	Description TC-14A Elevators & Escalators	21.43 % Minority	0.00 % Female
Commodity Code 099-07	Description TC-15B HVAC	14.29 % Minority	1.59 % Female
Commodity Code 099-05	Description TC-15C Plumbing	16.07 % Minority	0.00 % Female
Commodity Code 099-03-01	Description TC-15D Fire Protection	19.23 % Minority	5.77 % Female
Commodity Code 099-03	Description TC-16A Electrical	18.42 % Minority	7.89 % Female
Commodity Code 099-03	Description TC-16B Low Voltage Electrical	18.42 % Minority	7.89 % Female

VOLUME 1 - BID DOCUMENT - As part of the bid submission, the bidder must return Volume 1 - Bid Document with all pages intact, along with two (2) photocopies of all pages included in Volume 1.

Failure to return the original Volume 1 and two (2) photocopies of Volume 1 may result in rejection of the bid. Removal of any pages included in the original and photocopies of Volume 1 may result in rejection of the bid.

WBE availability at 1.05%.[21] Page two of the Legal Notice directly following the Availability Estimation states in item (b) that, "Failure of a bidder to comply with these requirements (Equal Employment Opportunity and Small Business Enterprise Program) at the time of the bid may be cause for rejection of the bid."[22]

Bidders also received a "Subcontractor Utilization Plan" requiring them to identify the ownership status of each subcontractor, specifically total MBE, total WBE, total SBE, and total White percentages,[23] a "Covenant of Non-Discrimination Policy,"[24] and a "Solicitation Certification Form" which detailed solicitations made by the bidder to subcontractors and required them to indicate the type of ownership of each.[25]

E. The Cincinnati Convention Center Project

On December 23, 2003, the City issued an invitation to bid on the drywall portion of the Cincinnati Convention Center project. Cleveland was the lowest bidder in the initial round of bidding. However, all bids were rejected because none of the bidders met the 35% SBE participation goal for the drywall portion of the convention center project. The City conducted an emergency re-bid, in which Cleveland was

---

[21] App. 1b.

[22] App. 44b.

[23] App. 31b.

[24] App. 26b-27b.

[25] App. 28b.

again the lowest bidder. However, its bid only contained 10% SBE participation, whereas a competitor, Valley Interior Systems, Inc. ("Valley"), achieved 40% SBE subcontractor participation, all of which were MBEs and/or WBEs. Although its bid exceeded Cleveland's by $1,246,022, the City awarded the drywall contract to Valley solely because it met the SBE participation goal. The City acknowledged that Cleveland's bid was acceptable in all other respects and it was otherwise qualified and able to perform the work.[26] On March 30, 2004, Cleveland brought an action against the City for, among other things, violating its 14th Amendment equal protection rights through the imposition and application of its SBE Program.

F. Proceedings Below

After a trial on the merits, the trial court found that the SBE Program Rules and Guidelines created race and gender-based classifications and were unconstitutional on their face and as applied.[27] The trial court stated that in the process of soliciting bids for the drywall contract, the City pressured and encouraged bidders, including Cleveland, to draw upon race and sex-based classifications that the City concedes could not withstand the requisite heightened standard of review. Specifically, the trial court found that eight provisions of the SBE Program's Rules and Guidelines indisputably pressured and encouraged contractors to recruit and utilize subcontractors based on race and/or gender in violation of Cleveland's rights under 42 U.S.C. §1983.[28] The trial court

---

[26] Petitioner's App. 18a.

[27] Petitioner's App. 53a, *et seq.*

[28] Petitioner's App. 66a-69a.

found in favor of Cleveland and permanently enjoined the City from applying the race and gender-based classifications in the Rules and Guidelines absent a formal determination that a race-based program was narrowly tailored to fulfill a compelling governmental interest or that a gender-based program was substantially related to genuine and important governmental interests.[29]

Both Cleveland and the City appealed to the First District Court of Appeals. The City argued, among others, that the trial court erred by concluding that the SBE Program contained impermissible race and gender-based classifications, contending, as it does here, that the program was a lawful outreach program that merely encouraged contractors to use good faith efforts to provide subcontracting opportunities for MBEs and WBEs. However, the First District Court of Appeals affirmed the decision of the trial court, concluding:

> Where the city's SBE Program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences. Therefore, the program's rules must be subject to strict scrutiny.[30]

It also found that to the extent that the City's program pressured bidders to hire women-owned subcontractors, the City was required to demonstrate an exceedingly persuasive

---

[29] Petitioner's App. 41a-45a.

[30] Petitioner's App. 25a.

justification.[31] The City conceded that it could not withstand either level of heightened scrutiny.[32]

The City filed a notice of appeal and a memorandum in support of jurisdiction with the Supreme Court of Ohio. Among its five issues presented for review was a challenge to the determinations that the SBE program contained race and gender-based preferences and was subject to heightened scrutiny. The Supreme Court of Ohio declined to exercise jurisdiction over this issue. However, it did exercise jurisdiction over two other issues presented for review, both of which present significant federal law and constitutional questions and are still pending.[33]

REASONS FOR DENYING THE PETITION

I. This Court Has No Jurisdiction Under 28 U.S.C. §1257 To Grant this Petition Because There Has Not Been a Final Appealable Judgment

This Court may not exercise appellate jurisdiction except as explicitly permitted by Congress.[34] In its Petition, the City

---

[31] Petitioner's App. 25a-26a.

[32] Petitioner's App. 26a.

[33] Petitioner's App. 1a-2a.

[34] *American Const. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 378 (1893) ("This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by congress.").

premises this Court's jurisdiction on 28 U.S.C. §1257(a), which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257 grants to this Court jurisdiction only over appeals in which there has been a final judgment. This Court has explained that:

> This provision establishes a *firm final judgment rule*. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As we have recognized, the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 569 (1945).[35]

This Court elaborated, "in general, the final judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the state.'"[36] There is no final judgment even if all that remains to be decided are "a few loose ends."[37]

While an order from the highest court of the State, in this case, the Supreme Court of Ohio, denying discretionary review is a final judgment that may be appealed to this Court, the Supreme Court of Ohio granted discretionary review of two of the five issues presented by the City and both issues involve significant federal questions. Specifically, the Supreme Court of Ohio accepted for review 1) whether, under Cincinnati's specific public bidding laws, a disappointed bidder for a City contract may have a constitutionally

---

[35] *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 80-81 (1997) (emphasis added).

[36] *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

[37] *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) (citing *Bruce v. Tobin*, 245 U.S. 18 (1917); *Martinez v. International Banking Corp.*, 220 U.S. 214, 223 (1911); *Mississippi Central R. Co. v. Smith*, 295 U.S. 718 (1935)) ("Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up-for example, where liability has been determined and all that needs to be adjudicated is the amount of damages.").

protected property interest in that contract and 2) whether a disappointed bidder may recover lost profit damages in a 42 U.S.C. §1983 action upon proving a constitutional violation.

Thus, while the Supreme Court of Ohio denied discretionary review of the equal protection issue now presented to this Court, there are still ongoing proceedings in the Supreme Court of Ohio involving significant federal constitutional questions that are likely to be appealed to this Court at a later date. Therefore, there has not been a "final judgment" within the meaning of 28 U.S.C. §1257.

Jurisdictional statutes like 28 U.S.C. §1257 must be strictly construed so as to give effect to the wishes of Congress.[38] Strictly construing 28 U.S.C. §1257 so as to give effect to the wishes of Congress leads to the definitive conclusion that this Petition is not ripe for review and this Court does not have jurisdiction.

While there is a firm final judgment rule, there are four narrow exceptions articulated in *Cox Broadcasting Corp. v. Cohn*.[39] However, none of these exceptions apply here.

The first exception involves cases in which there are further proceedings in the state courts but where the federal issue is conclusive or the outcome of further proceedings is preordained.[40] That is not the case here as the federal constitutional issue of whether Cleveland's constitutional due process rights have been violated by deprivation of the

---

[38] *Palmore v United States*, 411 U.S. 389, 396 (1973).

[39] 420 U.S. 469 (1975).

[40] *Id.* at 479.

contract, and whether Cleveland is legally entitled pursuant to 42 U.S.C. §1983 to seek damages in the form of lost profits, has not and will not be conclusively determined by the outcome of any decision by the Supreme Court of Ohio. In the event of an unfavorable decision in the Supreme Court of Ohio, Cleveland could, and would, seek review by this Court. The outcome of the proceedings remaining in the Supreme Court of Ohio is not preordained but remains uncertain. This first exception simply does not apply.

The second exception applies to cases in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings.[41] While this would seem to apply to the issue presented in the Petition, there is a qualification that there may not be other issues pending below that could also require review by this Court at a later date.[42] This caveat prevents piecemeal review:

> We observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were *no other federal issues* to be resolved. There was thus no probability of piecemeal review with respect to federal issues.[43]

---

[41] *Id.* at 480.

[42] *Id.* at 477 ("in most, if not all, of the cases in these categories [exceptions to final judgment rule], these additional proceedings [in state court] would not require the decision of other federal questions that might also require review by the Court at a later date . . .")

[43] *Flynt v. Ohio*, *supra* note 36, at 621 (emphasis added).

Similarly, in *Florida v. Thomas*, this Court reiterated that:

> We have also noted that we treat state-court judgments in this category [the second exception] as final on the assumption that "the federal questions that could come here have been adjudicated by the State court," and the state proceedings to take place on remand "could not remotely give rise to a federal question . . . that may later come here."[44]

The two issues currently on appeal to the Supreme Court of Ohio are significant federal issues that could be appealed to this Court at a future date. Thus, this second exception to the final judgment rule does not apply.

The third exception involves situations where the federal claim has been finally adjudicated and there are further proceedings in state court on the merits, but in which later review of the federal issue cannot be had, regardless of the outcome of the case.[45] This exception does not apply to the case at bar because there is no impediment to this Court's consideration of the issue presented in this Petition at a later date.

The fourth and final exception involves those situations where the federal issue has been finally decided at the state court level and further proceedings are pending in which the party seeking review might prevail on the merits on nonfederal grounds, rendering unnecessary review of the federal issue by this Court, and where reversal of the state

---

[44] 532 U.S. 774, 778 (2001).

[45] *Cox Broadcasting Corp. v. Cohn*, *supra* note 39, at 481.

court on the federal issue would preclude further litigation on the relevant cause of action rather than merely controlling the nature and character of the proceedings still to come.[46] This does not apply to the issue presented in the Petition because the issues pending in the Supreme Court of Ohio are federal issues and reversal of the state court on the issue presented in the Petition would not affect the outstanding issues in state court.

This Court must deny the Petition because it does not have appellate jurisdiction over this case pursuant to 28 U.S.C. §1257.

II. The Petition Should be Denied Because the Lower Courts' Decisions are in Harmony with Long Standing Jurisprudence that Government Programs that Encourage and Pressure Discrimination Based on Race are Subject to Strict Scrutiny

A. Petitioner's Characterization of its SBE Program is not Controlling

Despite Petitioner's characterization of its SBE program as a mere outreach or tracking program, the trial court and the First District Court of Appeals correctly found that the SBE Program is race and gender-conscious and cannot withstand heightened scrutiny. While the City describes its program as a "discretionary, non-mandatory municipal outreach/tracking program designed to promote equal opportunities for minority-owned and women-owned

---

[46] *Id.* at 482.

businesses,"[47] the City completely ignores the provisions the lower courts found objectionable and which Cleveland cited previously herein. The City's characterization of its SBE Program is not controlling for the purposes of determining whether it contains race or gender-based classifications triggering heightened scrutiny. This is amply supported by prevailing jurisprudence.

As the Ninth Circuit opined, a program like the City's SBE Program is, "not immunized from scrutiny because [it] purports to establish 'goals' rather than 'quotas.' We look to the economic realities of the program rather than to the label attached to it."[48] The Sixth Circuit agreed, finding that, "although explicit racial preferences must withstand strict scrutiny, the government may not avoid searching review merely by invoking the phrase 'good-faith effort to solicit.'"[49] Further, the Sixth Circuit noted that, "where 'outreach' requirements operate as a sub rosa racial preference-that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors-courts must apply strict scrutiny."[50]

While the City has attempted to mask the true character of its SBE Program by describing it as "outreach" or "for tracking purposes only," that does not change its true nature,

---

[47] Petitioner's Br. at 17.

[48] *Bras v. California Public Util. Com'n*, 59 F.3d 869, 874 (9th Cir. 1995).

[49] *Safeco Ins. Co. of America v. City of White House, Tenn.*, 191 F.3d 675, 691 (6th Cir. 1999).

[50] *Id.* at 692.

which is a program designed to coerce contractors into subcontracting with MBEs and WBEs to the extent of their availability as calculated by the City or lose the contract and risk a discrimination investigation and sanctions.

B. The Lower Courts' Determinations that the City's SBE Program Encourages and Pressures Discrimination Based on Race, Triggering Strict Scrutiny, are Consistent with this Court's Decision in *Adarand Constructors v. Pena*

The findings of the trial court and the First District Court of Appeals that the SBE Program contained provisions that encourage and pressure bidders to discriminate on the basis of race, triggering heightened scrutiny, are consistent with this Court's decision in *Adarand Constructors v. Pena*.[51] In *Adarand,* a subcontractor that was not awarded the guardrail portion of a federal highway contract due to a compensation clause that provided financial incentives to a prime contractor in return for hiring disadvantaged subcontractors asserted violations of the Fifth Amendment's Equal Protection Clause. This Court held, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[52] The Court went on to say, "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous

---

[51] 515 U.S. 200 (1995); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

[52] *Adarand Constructors*, 515 U.S. at 223.

cases."[53] The Court ultimately held that to the extent regulations provide incentives to contractors to use race-based classifications, those regulations are subject to strict scrutiny.[54]

The City tries to differentiate its SBE Program from that at issue in *Adarand* by pointing out that whereas the challenged regulations in *Adarand* provided a financial incentive to bidders to grant a preference to disadvantaged subcontractors, that is not the case with the SBE Program. However, the City misstates this Court's holding. First, *Adarand* does not stand for the proposition that only programs providing financial incentives are subject to strict scrutiny. Rather, it stands for the general rule that any race-based classification resulting in disparate treatment, including financial or other incentives, is subject to strict judicial scrutiny. Second, the financial incentive is present in the City's SBE Program as well. The financial incentive is the ultimate award of the contract and the avoidance of a time-consuming discrimination investigation and possible sanctions. If bidders want to maximize their chances of winning a public contract, they must retain the maximum practical participation of MBEs and WBEs as subcontractors as calculated by the City. If they do not, they risk losing the contract entirely. This is a financial incentive to discriminate on the basis of race and, as dictated by *Adarand*, triggers strict scrutiny.

---

[53] *Id.* at 237.

[54] *Id.* at 224.

C. The Lower Courts' Determinations that the City's SBE Program Encourages and Pressures Bidders to Discriminate Based on Race are Consistent with the Jurisprudence of other Federal Courts

In its Petition, the City attempts to argue that its SBE Program is merely an outreach or tracking program that does not encourage or pressure bidders to discriminate and thus is distinguishable from those programs ultimately held unconstitutional by other federal courts.[55] Again, however, in attempting to distinguish the City's SBE Program from those discussed in the cases, the City failed to discuss the specific provisions the lower courts found objectionable. A realistic examination of the City's SBE Program demonstrates that the trial court and First District Court of Appeals correctly found that where the City's program required documentation of a bidder's specific efforts to achieve participation of minority subcontractors to the extent of their availability as calculated by the City or risk a discrimination investigation and sanctions, the SBE Program was not a mere outreach program, but rather a program that undeniably pressured bidders to implement racial preferences and is thus subject to strict scrutiny.

In *Lutheran Church-Missouri Synod v. FCC,*[56] the United States Circuit Court for the District of Columbia found that indisputable pressure to discriminate on the basis of race, even if discrimination is not mandatory, is enough to trigger strict scrutiny. Citing *Adarand*, the court found that it was not

---

[55] Petitioner's Br. at 17, *et seq.*

[56] 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

necessary that the racial preferences be mandatory to trigger strict scrutiny, stating "the Supreme Court treated the regulations as a racial classification and did not even pause to consider the suggestion that the absence of a compelled racial preference makes strict scrutiny inapposite."[57] Indisputable pressure, even if discrimination is not compelled, is sufficient.

While the discrimination in *Lutheran* was not mandatory, the City's stated policy underlying the SBE Program to provide MBEs opportunities to participate to the extent of their availability, by its plain language, is intended to ensure, not just suggest, that minorities be provided with opportunities sufficient to ensure their participation to the extent of their availability as calculated by the City. At the very least, the SBE Program indisputably pressures bidders to discriminate, if not compels them to do so.

In *Monterey Mechanical v. Wilson*,[58] the Ninth Circuit found that a statute requiring general contractors to subcontract specified percentages of work to minority, women, and disabled veteran-owned subcontractors, or to demonstrate good faith efforts to do so, triggered strict scrutiny. The court found that, "though worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness. The scheme requires the bid solicitation in the context of requiring 'good faith efforts to meet [percentage] goals.'"[59] The court ultimately found that "the statute does not require set-asides, but it encourages them. A bidder can avoid disqualification by seeing to it that

---

[57] *Lutheran Church-Missouri Synod,* 154 F.3d at 491.

[58] 125 F.3d 702 (9th Cir. 1997).

[59] *Id.* at 711.

23% of the work goes to the designated classes, or showing that it tried to bring about that result." As such, the statute was race-conscious.

Similarly, the SBE Program contains a multitude of race-conscious provisions that encourage and pressure prime contractors to include a certain percentage of MBE and WBE subcontractor participation in their bids. The program provides benefits for those bidders who include MBEs at their estimated level of availability. Conversely, the program imposes burdens upon bidders who do not meet the subcontracting goals, or demonstrate good faith efforts to do so, including disqualification and potential investigations and sanctions to bidders who do not meet the specified MBE and WBE availability estimates.

And in *Safeco Insurance Company of America v. City of White House, Tennessee,*[60] the Sixth Circuit held that even if a regulation does not explicitly impose a specific numerical quota, but instead only requires "good faith efforts" to meet that goal, that alone would not insulate the regulation from strict scrutiny.[61] In that case, the Sixth Circuit found that the EPA's stated policy of awarding a "fair share" of sub-agreements to MBEs "implies that the outcome must meet an implicit goal – a goal derivable from one's calculation of 'fair share,' but almost certainly non-zero."[62]

---

[60] 191 F.3d 675 (6th Cir. 1999).

[61] *Id.* at 689, 691.

[62] *Id.* at 690. See also *Bras v. Calif. Pub. Util. Comm.*, 59 F.3d 869 (9th Cir.1995) (Rigid mandates are not a prerequisite to finding a racial classification).

The same is true of the City's SBE Program. The Rules and Guidelines use the word "ensure" to indicate explicitly, or at least implicitly, that bidders are required to utilize MBEs and WBEs to the extent of their availability as calculated by the City. The fact that the City calculates MBE and WBE availability and then presents an "Availability Estimation" in the bid documents strongly implies that the City has established a goal that should be met and requires documentation of good faith efforts to meet that goal. As was the case with the challenged regulation in *Safeco*, a "good faith" requirement to meet those goals is enough to trigger strict scrutiny.

III. The Lower Courts' Decisions Are Consistent with this Court's Holding in *Parents Involved in Community Schools v. Seattle School District No. 1*

Petitioner asserts that this case should be reexamined in light of this Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[63] ("*Community Schools*"). However, the holding in *Community Schools*, in fact, supports Cleveland's position that the racially-conscious components of the SBE Program are subject to strict scrutiny. *Community Schools* reaffirmed that, "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"[64] and that "this Court has recently reiterated, however, that '*all* racial classifications [imposed by government] ... must be

---

[63] 127 S.Ct. 2738 (2007).

[64] *Id.* at 2751 (citing *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

analyzed by a reviewing court under strict scrutiny.'"[65] The SBE Program distributes burdens and benefits on the basis of compliance with the race-conscious components of the Rules and Guidelines, namely the MBE and WBE availability estimates, and as such, the courts must apply strict scrutiny.

While the City cites Justice Kennedy's concurring opinion, which suggests that tracking the achievement of students from major racial and ethnic groups may not trigger strict scrutiny, as demonstrated by the Rules and Guidelines, the SBE Program is not merely a tracking program. *Community Schools* does not erode the reality that the City's SBE Program contains race-conscious provisions without the proper factual predicate to withstand strict scrutiny and, as such, is illegal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

---

[65] *Id.* at 2764 (quoting *Johnson v. California*, 543 U.S. 499, 505-506 (2005); citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

Respectfully submitted,

W. Kelly Lundrigan (0059211)
Counsel of Record
Gary E. Powell (0037546)
Elizabeth L. Hutton (081187)
Manley Burke LPA
225 West Court Street
Cincinnati, OH 45202
(513) 721-5525
Fax (513) 721-4268
wkl@manleyburke.com

Attorneys for Respondent